

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
SOKOLOW, et al., : 04-CV-397
:
Plaintiffs, : April 11, 2012
:
v. : 500 Pearl Street
: New York, New York
PALESTINE LIBERATION ORGANIZATION, :
et al., :
:
Defendants. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE RONALD L. ELLIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 [Telephone call cuts out during attorneys speaking.]

2 MR. TOLCHIN: Good afternoon, Your Honor. Robert
3 Tolchin here for the plaintiffs.

4 MR. HILL: Good afternoon, Judge. It's Brian Hill
5 and Mark Rochan for the defendants, the Palestinian Authority
6 and the PLO.

7 THE COURT: This is a conference in Sokolow v.
8 Palestinian Liberation Organization, et al., 04-CV-397. It is
9 Wednesday, April 11th at approximately 2:39 p.m.

10 This conference is for me to address two issues. One
11 is the Rule 35 examinations and the other concerns 30(b)(6)
12 depositions that have been scheduled.

13 MR. TOLCHIN: Your Honor, I don't think that's
14 correct.

15 THE COURT: What don't you think is correct? Who said
16 that?

17 MR. TOLCHIN: It's Bob Tolchin here. This conference
18 I was told was to address the proposed order to show cause that
19 we submitted last Thursday. That's the 30(b)(6) issue. We
20 were not -- I was not told that this conference would address
21 the Rule 35 issue at all.

22 THE COURT: The Rule 35 issue has been pending since
23 our March conference.

24 MR. TOLCHIN: This is true but the issue that I came
25 to this call prepared to address is the order to show cause

1 issue which is what your clerk advised yesterday that the
2 conference call would concern.

3 THE COURT: Well --

4 MR. TOLCHIN: I don't know what Your Honor had in
5 mind. It could be that it's not something that requires much
6 input from me but it's not something that was teed up for this
7 call.

8 THE COURT: Well, in that case -- in that respect I
9 didn't expect there would be too much input. I'm not sure how
10 much input there would even be on the 30(b)(6) except for me to
11 find out exactly what the factual situation was.

12 But as to the Rule 35 examinations it was my on my
13 agenda on the March 20th conference which I did not get to it
14 and what I was going to do is to tell the parties what my
15 position was with respect to those examinations. So I had
16 assumed I had gotten whatever input the parties were going to
17 give me.

18 MR. HILL: Your Honor, this is Brian Hill for the
19 defendants. I think you've got two letters from me and I'm
20 prepared to take Your Honor's ruling.

21 MR. TOLCHIN: Your Honor, before I come to any of
22 these conferences or these calls I review all the
23 correspondence, I review the underlying papers [inaudible] and
24 prepare for it. [Inaudible] Your Honor [inaudible].

25 THE COURT: I'm not sure what any [inaudible] means.

1 As I said, it's an issue that I'm ruling on. Is there somebody
2 who didn't know about this issue because I've been getting --
3 as I said it was ready -- it was cued up for the March 20th
4 conference and as our conferences often go longer than
5 anticipated I didn't get to it. So I'm getting to it now.

6 My ruling is that -- in the absence of a demonstrated
7 special circumstances I find that the examinations will take
8 place without any additional recording and that the persons --
9 the persons present will be the examiner and the individual
10 plaintiffs, whoever -- I gather there may be a need to have a
11 translator but other than that --

12 MR. TOLCHIN: But the problem is, Your Honor, there's
13 a translator then there's a translation and then we come to the
14 issue of whether what was said and what was translated was
15 accurately translated. Every time you have a translation
16 there's a need to be sure the translation was accurate. In
17 fact, in this case every time we have a deposition we have an
18 official translator and the other side brings [inaudible].
19 Sometimes they bring a pair of [inaudible]. If the person
20 being examined is speaking in Hebrew and there's a translator
21 who's translating to English and then there's disputes about
22 the examiner says well, he told me that he told the press and
23 the person says no, I didn't say I told the press. I said I
24 [inaudible] an example. There's no way to go back and look
25 [inaudible] what was actually [inaudible].

1 THE COURT: How would that be different if there was
2 no translator?

3 MR. TOLCHIN: Well, if there's a translator the
4 examiner heard it with his own ears and he heard directly from
5 the person speaking. Right now we're throwing in -- it's like
6 a chain of custody but we're throwing in additional [inaudible]
7 where the examiner doesn't know for sure what he heard
8 [inaudible] on a straight shooting expert but he only knows
9 what the translator told him. He can't tell you what the
10 person being examined actually said. There's no way to
11 preserve -- without a recording there's no preservation of that
12 first level [inaudible].

13 The other issue that arises here is that some of the
14 people who are being examined are children and there's a
15 concern to not put children in a difficult or uncomfortable
16 situation.

17 MR. HILL: Does Your Honor want to hear from --

18 MR. TOLCHIN: Perhaps these things are within what
19 Your Honor remarked. There may be a special circumstance.
20 Your Honor [inaudible] special circumstance [inaudible] two
21 categories of people who are being examined with the translator
22 and children might be a [inaudible].

23 THE COURT: Just hold on a second.

24 [Pause in proceedings.]

25 THE COURT: Mr. Tolchin, let me respond to you this

1 way. I began by saying that I had -- there had been no
2 demonstration of any special circumstances for any of the
3 examinations to be recorded and that was based on all the
4 information that had been sent to me since the issue was raised
5 I believe way back in February. So far I've been looking to
6 see if you've ever said any of this in any correspondence to me
7 about why it would be necessary to have a recording, and I
8 don't see it in any papers and it may be that you had mentioned
9 it one of our conferences. I just don't have it.

10 MR. TOLCHIN: Your Honor, I would humbly say that not
11 having -- first of all, I'm actually away on vacation now so I
12 don't know the benefit of even the paper file and not having
13 been aware that this issue would be addressed today I didn't
14 have occasion to get things emailed to me or access the files
15 to review any of this. I'm just not in a position to answer
16 you directly.

17 THE COURT: Well, all right. I'll put it to you this
18 way. As I said, I don't have any record and regardless of what
19 we said about this conference I could have just written this
20 down. I was just giving you the benefit of giving it to you
21 orally so that you'd have more time to do it but otherwise I
22 would have just written it and give it to you. So your
23 preparation is not an issue.

24 But to the extent that you did not raise it as an
25 issue I'm concerned about that because if I make a ruling based

1 upon the submissions that have been made to me then that's the
2 ruling that it is and I haven't ignored any fact or law that
3 was presented to me. Now, as I said, I don't recall you
4 indicating these special circumstances which would suggest that
5 the individuals who would -- the recording would only be for
6 exams where these special circumstances occurred anyway. I
7 take it what's what you're saying would be the special
8 circumstances.

9 MR. TOLCHIN: That's correct. I don't know if Your
10 Honor would be -- how Your Honor would want to proceed but I'll
11 tell you that the exams that we're talking about scheduling
12 right now still in April are English speakers. The issues that
13 I've raised wouldn't be applicable until later [inaudible].
14 It's not an emergency issue that [inaudible] tomorrow and if
15 Your Honor wishes I could send you something, a letter or
16 something outlining our position in writing and make sure you
17 have it in the next few days.

18 THE COURT: Well, that may be the only way we can
19 address this because as I said I make the ruling based upon
20 what's presented to me and as a technical matter if you had --
21 even if you had styled this, what you're submitting to me a
22 reconsideration it would not be appropriate unless you had
23 raised the factual or legal matter before I made my ruling. Do
24 you understand what I'm saying?

25 MR. TOLCHIN: I do. I appreciate the [inaudible].

1 THE COURT: Mr. Hill, since I did not have any -- I
2 may not have focused on whether or not there be any -- no
3 special circumstance has been presented to me. I know that the
4 parties had done different things when they were not English
5 speakers. I did not know that that was the difference that we
6 were talking about with respect to the Rule 35s.

7 MR. HILL: Your Honor, if I could respond briefly.
8 Let me make a couple of points. The first one is that we
9 raised this in a letter on March 16th that Mr. Tolchin received
10 the next day on March 17th. We appeared before you at the
11 hearing on March 20th and I asked Your Honor to rule on March
12 20th and Mr. Tolchin said he would send you a letter in the time
13 required by the rules and asked you to defer your ruling, and
14 he did not send you a letter in the time required by the rules
15 and I therefore respectfully submit that the opposition to our
16 request has been waived by the failure to timely respond to it.

17 Let me respond to the two specific circumstances
18 which is Your Honor's recollection is correct you are hearing
19 for the first time on this telephone call. The two specific
20 circumstances Mr. Tolchin contends support recordation of the
21 Rule 35 mental examinations are that some of them will be
22 conducted with the assistance of a translator and that some of
23 them will be of minors. Neither of these justify recordation.
24 The situation with the dispute over whether someone said
25 something is exactly the same whether people are speaking

1 English or speaking a foreign language and it can be resolved
2 at trial if necessary through cross-examination of the experts
3 and the plaintiff and it doesn't make any difference whether
4 the translator is there to facilitate the communication or not.
5 Frankly, it can be resolved through the cross-examination of
6 the translator. There's no need to record with the intended
7 negative effects that that has on the examination just because
8 there's a translator present.

9 With respect to children, the examiners that we have
10 proposed are certified to treat children. They had treated
11 dozens if not hundreds of children in similar examinations.
12 There is absolutely no reason to think that anything improper
13 is going to happen with the child in the room any more than you
14 would with an adult. That I also submit is not a basis to
15 record these.

16 If the court wants to hear further from Mr. Tolchin
17 obviously we'll defer to the court on that but I would
18 respectfully submit that the right procedural posture would be
19 in the form of a motion for reconsideration on the ruling on
20 the request we previously made.

21 THE COURT: Just to be clear, I'm not going to stand
22 on form because ultimately I'm still standing in the stead of
23 the district judge and so to the extent that these issues can
24 be cited on the merits I would prefer that at least Mr.
25 Tolchin's position be on record so that even if it goes up to

1 the district judge the district judge will have the benefit of
2 my opining on the record even if it's belated because the
3 district judges I see do like to have that.

4 So, Mr. Tolchin, when will you be back in operation?

5 MR. TOLCHIN: I will be back next week but I will have
6 somebody work on this in the interim.

7 THE COURT: Mr. Hill --

8 MR. TOLCHIN: It doesn't have to wait until I come
9 back to [inaudible].

10 THE COURT: Mr. Hill, is Mr. Tolchin correct that the
11 "special circumstances" that he's raised today do not apply to
12 the Rule 35s that are immediately scheduled?

13 MR. HILL: As I understand it, Your Honor, the four
14 people that are currently proposed for April 29th and 30th are
15 all now currently adults and all currently speak English.

16 THE COURT: What about the -- are the others scheduled
17 in May or any schedule after that?

18 MR. HILL: Those are the only ones that we've been
19 able to schedule thus far, Your Honor.

20 THE COURT: So while time is not of the essence, Mr.
21 Tolchin, if this were a -- I was going to say a football game
22 but you might think I was talking about American football. If
23 this were a soccer game you're already into overtime. While I
24 may not stand on ceremony you should at the very least consider
25 the time frames that would be applicable in a motion for

1 reconsideration to be applicable in this circumstance.

2 MR. TOLCHIN: Just tell me a date, Your Honor, and
3 I'll comply.

4 THE COURT: Given the circumstances I would like to
5 have this by the end of next week.

6 MR. TOLCHIN: Not a problem.

7 THE COURT: That would be Friday, April 20th.

8 MR. TOLCHIN: Not a problem. It will be done.

9 THE COURT: All right.

10 MR. HILL: Your Honor, just because I expect to be in
11 the Middle East at that time, when do you want a response from
12 us?

13 THE COURT: When do you -- well --

14 MR. TOLCHIN: Objection. Assumes facts not in
15 evidence.

16 THE COURT: Interestingly that is exactly what went
17 through my mind, that -- I'm not expecting anything. You mean
18 when would I allow you to do a response?

19 MR. HILL: Yes, Your Honor. If I did a response when
20 should I send it to you by in time for Your Honor's ruling?

21 THE COURT: Well, a week after that would be what I
22 would normally give you.

23 MR. HILL: That would be fine, Your Honor.

24 THE COURT: Would you be back by then?

25 MR. HILL: Yes.

1 THE COURT: That would be the 27th.

2 Now, with respect to the 30(b)(6) issue, I'm a little
3 confused and the reason I'm confused is this. As I understand
4 a 30(b)(6) what happens is one party says these are the topics
5 that I want a witness on and the other side identifies a
6 witness that can talk about those topics. I don't know of
7 anything in that formulation which speaks to the number of
8 witnesses or any limitation on the witnesses and so I'm not
9 exactly sure what the issue we're deciding.

10 MR. TOLCHIN: Your Honor, your formulation of the
11 30(b)(6) formula is almost correct but there's one aspect that
12 you left out which I think is relevant.

13 THE COURT: What is that?

14 MR. TOLCHIN: One party designates a topic or a list
15 of topics that they want to depose the other party -- the
16 corporate party about.

17 THE COURT: Yes.

18 MR. TOLCHIN: The corporate party designates a
19 witness or witnesses. It's often more than one witness.

20 THE COURT: That's --

21 MR. TOLCHIN: That's the essence. So I can make -- I
22 can serve a 30(b)(6) notice that lists any number of topics and
23 they can produce one witness who may know from his own
24 knowledge or may have gathered all the information that the
25 company has and he speaks as a spokesman for the company or

1 they may produce more than one witness who has done one of
2 those things.

3 THE COURT: I think that's what I said.

4 MR. TOLCHIN: I think the difference is Your Honor I
5 think left out that it could be more than one witness.

6 THE COURT: I didn't think I left it out.

7 MR. TOLCHIN: Maybe I misheard it. It could be me.
8 So the issue here is we have designated some topics and we
9 anticipate that as the case proceeds there will likely be other
10 topics that we want to depose the defendant about.

11 THE COURT: That's a different issue. Now you're not
12 talking about multiple designated 30(b)(6)s. You're talking
13 about introducing new topics.

14 MR. TOLCHIN: Correct. I don't care whether they bring
15 the same witness back to speak for the defendants every time or
16 if [inaudible] different people. That's up to them.

17 THE COURT: But I do care whether or not you identify
18 the topics early enough so that the defendant isn't faced with
19 that choice.

20 MR. TOLCHIN: We have identified right now the topics
21 are apparent to us that we want to do 30(b)(6) depositions
22 about. We anticipate reasonably that as the case proceeds
23 there will be further topics that we'll want to do 30(b)(6)
24 witnesses [inaudible] about.

25 THE COURT: This is where we may have a slight

1 difference about what you may reasonably expect in terms of
2 30(b)(6) topics. That is, to the extent that you do serial
3 30(b)(6) topics I would put the burden on you to indicate to me
4 why they were not identified earlier in the litigation.

5 MR. TOLCHIN: I have another way to proceed. I can
6 wait until a few months before the end of discovery and serve
7 one big 30(b)(6) notice which I don't think that's fair to
8 anybody. It seems that we will wind up near the end of
9 discovery going over for a marathon on a series of deposition
10 sessions and it's also not fair to me because I [inaudible] one
11 of these topics that I noticed now I may nail down an issue and
12 I know [inaudible] other discovery on that issue. It's up to
13 each party who plan their discovery strategy to see what the
14 best use of time and what's the best order to proceed.

15 THE COURT: But understand this is the way I expect
16 this to happen. I think that a party analyzes their
17 litigation, determines what topic they want to litigate on.
18 It's certainly possible in some cases that a topic which could
19 not have been anticipated comes up because either somebody
20 testifies about something during a deposition or some documents
21 show up and a new topic is introduced. However, that puts the
22 burden on the person who's going to say I've just discovered
23 this topic to convince me that they just discovered this topic
24 and could not have made known to the other party. Otherwise I
25 get chaos.

1 Now, how much of a burden that is may not be that
2 difficult but if -- for example, if you had a personal injury
3 case, you want to sue a hospital and you said you want somebody
4 to testify about the hospital's procedures and practices and
5 they identify some person and then during some deposition you
6 find out that the hospital has some particular insurance plan.
7 Well, there wouldn't be any problem because there's no way for
8 you to anticipate the insurance plan. On the other hand,
9 there's lots of things about personal injury that you should
10 know going in because they're embodied in either your complaint
11 or the circumstances which you've described in the complaint.

12 For you to, for example, say I want some witness who
13 can testify about emergency room procedures and then later on
14 you want somebody to testify about anesthesiological, that to
15 me would seem to be an inappropriate division because you could
16 anticipate that you want to talk about both those topics from
17 the -- from the incept of the litigation -- onset of the
18 litigation.

19 MR. TOLCHIN: Your Honor, we proposed this order to
20 show cause because we wanted to know -- we wanted to get the
21 ruling from the court, a direction from the court as to what
22 our rights are under the rules. [Inaudible] rules allowing us
23 to serve the 30(b)(6) notice now and to follow up with a
24 further 30(b)(6) notice. [Inaudible] defendants disagreed. We
25 didn't want to be in the deposition where at least now

1 [inaudible] sticking by their arguments and then we would argue
2 about it after the fact [inaudible] from doing further
3 deposition after the fact. Whatever Your Honor's ruling is,
4 whatever you tell us the law is in this case we will proceed
5 accordingly.

6 THE COURT: My question is do you understand what I'm
7 saying. Do the defendants understand what I'm saying?

8 MR. TOLCHIN: Yes. It sounds like --

9 MR. HILL: Your Honor, yes, I understand what you're
10 saying. You're saying what the rules require and one of the
11 objections we have to this whole process is you're being asked
12 to render an advisory opinion about what the rules require.
13 There is no concrete dispute between the parties that requires
14 resolution by the court.

15 MR. TOLCHIN: That is not so.

16 MR. HILL: Well, I disagree, Mr. Tolchin. The
17 court --

18 MR. TOLCHIN: You have told -- the defendants have
19 told [inaudible].

20 THE COURT: Mr. Tolchin, counsel --

21 MR. TOLCHIN: [Inaudible] deposition that further
22 schedule then they will object to any further 30(b)(6) notice
23 unless we can persuade the court that they were necessary. We
24 say that just like [inaudible] produce or a deposition notice
25 we can serve [inaudible] a 30(b)(6) notice [inaudible] topics

1 as long as it's a reasonable time before the end of discovery.
2 Whatever Your Honor rules is the standard for this case. It's
3 not an advisory ruling. [Inaudible] that this is their position
4 and we haven't offered our position and we don't want to wait
5 until after we have proceeded with a deposition to find out
6 that by doing so [inaudible].

7 THE COURT: Notwithstanding --

8 MR. TOLCHIN: -- [inaudible] we've been allowed 35
9 depositions and to say that [inaudible] that's it, the
10 [inaudible] allowed to do any more 30(b)(6) depositions we view
11 that as unfair [inaudible]

12 THE COURT: Counsel, my question was do you understand
13 what my position was. Now, if you don't understand what my
14 position is I can make my position clear but the argument that
15 you're having now does not address what I've just said. Now,
16 if you --

17 MR. TOLCHIN: I would ask Your Honor to make your
18 position clear.

19 THE COURT: That is that the question of putting a
20 party to the task of presenting a 30(b)(6) witness if you
21 unnecessarily bifurcate the topics that would normally be done
22 by the 30(b)(6) then there could be -- there could be
23 ramifications because what you'd be requiring a party to do is
24 to produce somebody twice when you could have had them produce
25 him once. It's not that -- it's not because you're prohibited

1 from having the person appear twice. It's not a limitation on
2 the depositions but a limitation on you making known in a
3 timely fashion what the topics are that you want to have a
4 30(b)(6) on. I don't think -- my position is that you can't
5 just -- you can't take related 30(b)(6) topics and say I'll
6 take some in the beginning and some in the end just because I
7 can. I think that would be inefficient and a burden on the
8 party and the court unless it was a topic that you could not
9 have anticipated at the time that you originally scheduled the
10 30(b)(6).

11 MR. TOLCHIN: It sounds like Your Honor is saying that
12 it would be preferable for us to serve a large 30(b)(6) notice
13 now listing every topic that we can foresee at this time.

14 THE COURT: I hesitate to use the term every topic
15 that you can foresee because I don't think that's what Rule 26
16 says.

17 MR. TOLCHIN: Every relevant topic that's appropriate
18 to Rule 30(b)(6).

19 THE COURT: If you know that you have some relevant
20 topics I think it would be important to let the defendants know
21 that you intend to seek discovery on that, yes. If what you're
22 saying --

23 MR. TOLCHIN: As to some of these topics we have --
24 we're still dealing with interrogatory responses, document
25 production and it seems that we might not have chosen to

1 proceed with the deposition at this point.

2 THE COURT: In other litigations parties don't have
3 this problem. What they do is they let the parties know what
4 the topics are and then they sit down and they discuss it and
5 they'll come to me and they'll say Judge, we've scheduled this
6 as a 30(b)(6) and we may take them as a 30(b)(6) but we've also
7 scheduled this person as a witness or if we take this witness'
8 deposition it may mean that we'll cover the topic that we have
9 for the 30(b)(6) or they'll say if we do the 30(b)(6) we might
10 not need this individual witness but they have at the beginning
11 because they know all their topics and they know the witnesses
12 they can make those determinations. One party can say well, I
13 know that so and so is going to be able to testify about X and
14 we might want to have him also testify about this 30(b)(6) and
15 we can combine them because we know what's coming.

16 But if you do it piecemeal it creates chaos and
17 duplication and a whole host of other problems. Now, the fact
18 that you may -- the two sides may have difficulty conversing
19 with each other doesn't change the fact that litigation ought
20 to proceed in an orderly fashion. If you know that you want to
21 find -- if you want to know that you want to discover a topic -
22 - we have initial disclosure in part so that there aren't going
23 to be surprises. So if there are topics that you want to do a
24 30(b)(6) on, by all means let the defendants know. They may
25 object to them. They may say they're irrelevant and then I can

1 rule on it.

2 MR. HILL: Your Honor, I don't know if you want to
3 hear further from me. Our position is that there's no ripe
4 issue for you to rule on now and I understand you've had a
5 discussion with Mr. Tolchin which is going to be transcribed
6 but I don't think that there's any further order required from
7 Your Honor based on the current state of the record.

8 THE COURT: I agree with that.

9 MR. TOLCHIN: Your Honor, there is the other issue
10 that was raised in the order to show cause [inaudible].

11 MR. HILL: Your Honor, let me just address a couple of
12 points on this order to show cause. I think there shouldn't be
13 any relief or order granted in response to it. It's got at
14 least three procedural improprieties that I can enumerate
15 having only gotten it 24 hours ago, the first of which is that
16 it was apparently sent to the court on Thursday, April 5th, and
17 it was not served on us and this is now [inaudible].

18 MR. TOLCHIN: An order to show cause is not meant to
19 be served --

20 THE COURT: Counsel --

21 MR. HILL: Mr. Tolchin, please let me address the
22 court.

23 THE COURT: Counsel, counsel, before either of you get
24 further into this, whatever problems that were with the order
25 to show cause and you can certainly enumerate whatever ones you

1 think are [inaudible], I determine that the order to show cause
2 was, first of all, not an appropriate way to address this issue
3 and the only issue that I thought necessary for me to address
4 was the 30(b)(6) one.

5 MR. HILL: If that's Your Honor's ruling I won't
6 address the other issue at all and we can complete the call as
7 far as I'm concerned.

8 MR. TOLCHIN: The question is, Your Honor, the issue
9 about the deposition conduct and what rule applies at the
10 deposition needs to be addressed I believe at some point
11 [inaudible] by an order to show cause so that it would be
12 expeditiously. If Your Honor would prefer that I raise it some
13 other way I'd be happy to but when we come to a deposition and
14 we're told the rules don't apply and U.S. judge's rules don't
15 apply and they have to conduct this by Israeli rules which is a
16 joke because there are no depositions in Israel so there are no
17 deposition rules. It puts us in a vacuum and if we're talking
18 about going ahead to other depositions where Mr. Hill's
19 [inaudible] stand up [inaudible] and I don't care which is what
20 happened.

21 THE COURT: As I said, I determine that the thing that
22 I wanted to address was the 30(b)(6). If you want to raise any
23 of these other issues as discovery disputes, raise them in the
24 normal course. Talk them over with the other side and then
25 submit it to me just the way the rules require and I'm not --

1 other than that, we'll be adjourned.

2 MR. HILL: Thank you, Your Honor.

3 MR. TOLCHIN: Thank you, Your Honor.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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6 _____
Shari Riemer

7 Dated: April 16, 2012
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